FOR ARGUMENT

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# Supreme Court of the United States

October Term, 1979

No. 79-672

NATIONAL LABOR RELATIONS BOARD,
*Petitioner*

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, *et al.*,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[redacted]

## BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN AND NEW YORK PUBLIC INTEREST RESEARCH GROUP

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## MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN AND NEW YORK PUBLIC INTEREST RESEARCH GROUP

Public Citizen and the New York Public Interest Research Group hereby move this Court for leave to file the accompanying brief *amicus curiae* urging the Court to affirm the decision below. It is the position of *amici* that any restriction on the right of labor unions to peacefully picket at the premises of a retailer for the purpose of seeking consumer support for a boycott of the products of a firm with which the union has a dispute is constitutionally impermissible.

## INTERESTS OF AMICI

*Amici* are two broad-based consumer organizations whose interests will be affected by the disposition of the present proceeding. Each *amicus* has a significant organizational interest in ensuring that information concerning the existence of labor disputes is available to consumers in the form and in the manner in which it is most effective — through informational picketing at retail outlets. This information is needed so that members and supporters of *amici* may make purchasing decisions fully aware of the consequences of those decisions on ongoing labor disputes.

Public Citizen is a non-profit organization involved in a wide variety of activities on behalf of consumers. One of Public Citizen's foremost concerns has been to promote the free flow of information to consumers concerning, among other things, the price, quality, and availability of specific services. Attorneys for Public Citizen represented the consumer plaintiffs in successful suits challenging the validity of lawyers' minimum fee schedules, *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), and the constitutionality of statutory prohibitions on drug price advertising, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976). Public Citizen has also submitted *amicus* briefs in *Bigelow v. Virginia,* 421 U.S. 809 (1975); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *In re Primus,* 436 U.S. 447 (1978); and *Village of Schaumburg v. Citizens for a Better Environment,* No. 78-1335 (February 20, 1980), each of which affirmed that the public has an independent right of access, secured by the First Amendment, to certain information of concern to consumers. Public Citizen is supported by contributions from approximately 40,000 individuals annually, many of whom are members of labor unions or



who support such organizations and who thus have an interest in being informed about the existence of labor disputes. The New York Public Interest Research Group ("NYPirg") is a non-profit consumer organization active in a broad range of areas. NYPirg has over 200,000 members and contributors, many of whom are also members or supporters of labor unions and thus have an interest in being advised about labor disputes.

The interests presented by *amici* in this case are the interests of consumers in establishing that the right of unions to engage in peaceful picketing to seek consumer support for a boycott of the products of a firm with which the union has a dispute cannot be abridged consistent with the First Amendment. *Amici* are also concerned about the effect of an adverse ruling on picketing to promote consumer boycotts in other contexts. If this Court rules that peaceful picketing designed to enlist consumer support properly may be banned, the government may next attempt to prohibit others, especially consumer groups and other advocacy organizations, from picketing to espouse their views, an effort that would raise most serious First Amendment difficulties. For these reasons, the presentation of *amici's* views in the accompanying brief will assist the Court in considering the important constitutional issues raised in this action from a different viewpoint than respondents.

Respectfully submitted,

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## BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN AND NEW YORK PUBLIC INTEREST RESEARCH GROUP

### INTERESTS OF *AMICI*

*The interests of amici* are set out in the accompanying motion for leave to file this brief *amicus curiae.*

### PRELIMINARY STATEMENT

*Amici* agree fully with respondent Retail Store Employees Union, Local 1001 and the majority below that the informational picketing involved in this case is not one of the "isolated evils" at which section 8(b) (4)

(ii) (B) is directed. *See NLRB v. Fruits & Vegetable Packers, Local 760,* 377 U.S. 58 (1964) (*"Tree Fruits"*). Rather, we submit that as this Court stated in *Tree Fruits,* where, as here, the picketing is plainly directed at the products of the primary, not the secondary, employer, the picketing falls outside the narrow proscription in section 8(b) (4) (ii) (B). Therefore, this Court must reach the constitutional issue only if it rejects respondent's statutory argument, which this brief will not discuss. However, the very existence of these serious constitutional questions constitutes a further basis for sustaining respondent's position on the statutory construction issue. *See Johnson v. Robison,* 415 U.S. 361, 367 (1974); *United States v. Thirty-seven Photographs,* 402 U.S. 363, 369 (1971).

## SUMMARY OF ARGUMENT

This case presents the question of whether the National Labor Relations Board ("petitioner" or the "Board") may, consistent with the First Amendment, prohibit labor unions from picketing peacefully at the premises of retailers for the purpose of urging the public to boycott the products of the company with which the union has a dispute, solely because the retailer sells predominantly the struck firm's products. Petitioner contends that this form of informational picketing is proscribed under section 8(b) (4) (ii) (B) of the National Labor Relations Act, 29 U.S.C. § 158(b), because, according to petitioner, the foreseeable result of the picketing will be to persuade the retailer's customers to cease dealing with the retailer altogether.

*Amici* submit that this Court should reject the construction of section 8(b) (4) (ii) (B) urged by petitioner,



and thereby avoid serious constitutional questions. These questions will necessarily arise because picketing has traditionally been afforded substantial First Amendment protection, and the proposed ban can be sustained only if it is narrowly drawn to meet a compelling state interest. *Thornhill v. Alabama,* 310 U.S. 88 (1940). As the majority below correctly observed, petitioner's construction of section 8(b) (4) (ii) (B) launches it toward a head-on confrontation with the First Amendment. *See also Tree Fruits, supra* 377 U.S. at 63; *id.* at 76 (concurring opinion of Mr. Justice Black). Not only would the right of unions to inform the public of a dispute be abridged, but so would the public's independent and equally strong right to be informed. In addition, the picketing ban sought by petitioner would undermine the associational rights of consumers, because many consumers, if advised, would exercise their right to support the union by boycotting the struck products.

When viewed in light of these serious constitutional flaws, it is apparent that the justifications offered for the ban are not compelling. The only interest served by the ban is the economic interest of retailers being picketed. But this Court has historically disfavored efforts to elevate economic concerns over those rights secured by the First Amendment. Nor is the justification any more compelling than that mustered for many other restrictions on speech struck down by this Court in recent years. Equally unavailing is petitioner's contention that there is no abridgment here because other means of communication are unaffected by the ban. Not only does this argument overlook the clear advantages to picketing and its special significance in labor disputes, but this precise argument has been repeatedly rejected by this Court when made in a First Amendment context.

## ARGUMENT

### ANY RESTRICTION ON THE RIGHT OF UNIONS TO PICKET THE PREMISES OF RETAILERS FOR THE PURPOSE OF ENLISTING PUBLIC SUPPORT FOR A BOYCOTT OF THE PRODUCTS OF THE FIRM WITH WHICH THE UNION HAS A DISPUTE WOULD VIOLATE THE CONSTITUTION.

There can be no dispute that picketing, even in the context of labor disputes, is protected First Amendment activity. *Thornhill v. Alabama,* 310 U.S. 88 (1940); *Police Department of Chicago v. Mosley,* 408 U.S. 92 (1972); *Teamsters Union v. Newell,* 356 U.S. 341 (1958). Accordingly, any attempt to restrict the right of unions to engage in picketing to enlist public support is unconstitutional unless it can survive the "exacting scrutiny" required by the First Amendment. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978). Petitioner must therefore shoulder the burden of proving that the restriction on the right of unions to picket is both directly related to the advancement of a compelling governmental interest and is closely tailored to that interest in order to minimize interference with First Amendment rights. *Thomas v. Collins,* 323 U.S. 516, 540-41 (1945); *see also Elrod v. Burns,* 427 U.S. 347, 362-63 (1976); *Buckley v. Valeo,* 424 U.S. 1, 25 (1976); *NAACP v. Button,* 371 U.S. 415, 438-39 (1963); *Shelton v. Tucker,* 364 U.S. 479, 488 (1960); *Talley v. California,* 362 U.S. 60, 62-64 (1960); *see generally* Note, *Less Drastic Means and the First Amendment,* 78 Yale L.J. 474 (1969).

While not conceding that First Amendment interests are even implicated, petitioner defends the picketing ban on the ground that it is both necessary to protect secondary employers from economic harm and is narrowly



drawn to achieve that end. Petitioner also suggests that there is no abridgment of First Amendment rights because the union remains free to avail itself of other means of advising consumers about its strike, such as handbills or leaflets. However, when viewed in light of the important societal interests in promoting the free flow of information relating to labor controversies, it becomes evident that the justifications offered by petitioner cannot withstand the "exacting scrutiny" the First Amendment demands.

In the first place, in addition to the union's right to inform the public of its dispute with an employer and seek the public's support, citizens have an independent and equally compelling right to receive information and make informed choices based on such information. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 756-57 (1976) (the First amendment affords protection "to the communication, to its source and to its recipients both"); *Procunier v. Martinez,* 416 U.S. 396, 408-409 (1974); *Kleindienst v. Mandel,* 408 U.S. 753, 762-63 (1972). It can hardly be doubted that the public has a strong interest in being informed of the existence of a labor controversy. Millions of Americans belong to labor unions. Millions more are sympathetic to their efforts and lend support to unions in a variety of ways during labor-management disputes. For these citizens, the fact that a labor dispute exists is, and historically has been, a vital concern, one that most assuredly affects purchasing decisions and is therefore comparable to the interest a consumer has in the price of pharmaceuticals, *see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* the availability and cost of legal services, *see Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *In re Primus,* 436 U.S. 412 (1978), or

in knowing that particular real estate is for sale, *see Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977). Thus, picketing geared toward informing the public of the existence of a labor dispute and enlisting public support is entitled to at least the qualified protection afforded to the various forms of "commercial" speech protected in these cases.

Moreover, because of the strong political and social overtones which are inherent in labor picketing, *amici* submit that this type of informational picketing is entitled to even greater protection. This Court has repeatedly emphasized in a series of cases, antedating the recent commercial free speech decisions, that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." *E.g., Thornhill v. Alabama, supra,* 310 U.S. at 102.

Indeed, in *Tree Fruits* this Court warned that "a broad ban against picketing might collide with the guarantees of the First Amendment." 377 U.S. at 63; *see also id.,* 377 U.S. at 76 (concurring opinion of Mr. Justice Black). To preserve the "uninhibited, robust, and wide-open debate" which has traditionally characterized the give and take in labor disputes, this Court has found it appropriate to adopt "by analogy" the standards of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), to govern libel actions arising in labor disputes covered by the federal labor laws. *See National Ass'n of Letter Carriers v. Austin,* 418 U.S. 264 (1974); *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966). And this Court has recently reaffirmed the principle that the right to engage in expressive activity to promote political or social goals is deserving of the full range of First Amendment protections. *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 776. *See also Thornhill v. Alabama, supra,* 310 U.S. at 101-102; *Mills v. Alabama,* 384 U.S. 214, 218 (1966); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U.S. at 764. Thus, since labor picketing necessarily involves substantial elements of political speech, it is entitled to considerable First Amendment protection.



The picketing restriction urged by petitioner goes beyond abridging the right of speech, however. Because of the nature of the picketing — to enlist the public's aid — petitioner's ban also serves to infringe upon the associational rights of those consumers who, if advised of the dispute, would choose to assist the union by boycotting the struck products. As Mr. Justice Harlan noted in his dissent in *NAACP v. Button,* 371 U.S. 415, 452-53 (1963), "[f]reedom of expression embraces more than the right of the individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective. . . ." *See also Buckley v. Valeo,* 424 U.S. 1, 15, 25 (1976). The picketing limitation seriously infringes that right by interfering with the flow of vital information, just at the point where the consumer must determine whether "to join with" the union in an effort to make the union's advocacy effective. By keeping consumers in the dark, the picketing ban thus not only deprives consumers of the right to support the union if they so choose, but also compels them, *unwittingly,* to support the employer. The end result, of course, is that the Board arrogates to itself the judgment of when citizens should be allowed to determine what role, if any, they wish to play in a labor controversy. *Amici* submit that this result is plainly antagonistic to basic notions of

personal freedom embodied in the First Amendment. *Cf. Village of Schaumburg v. Citizens for a Better Environment,* No. 78-1335 (February 20, 1980), slip op. at 17.

When arrayed against the constitutionally protected rights it infringes, the justification for the picketing ban falls short of being compelling. The sole governmental interest relied upon by petitioner is that of safeguarding the economic interests of retailers who sell the struck firm's products. However, economic justifications for submerging First Amendment rights have never fared well before this Court. Just recently, in *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977), this Court found that a ban on the use of "for sale" signs could not be supported by the claim that it was needed to preserve property values, or even the racial integrity of the community. Similarly, in *Bates v. State Bar of Arizona,* 433 U.S. 350, 377-80 (1977), this Court was unpersuaded by the argument that economic concerns justified a ban on advertising by lawyers. Among the justifications proffered and rejected as uncompelling in *Bates* were the contentions that advertising would increase overhead costs, which would be passed along to the public, and that the cost of advertising would create a substantial barrier to entry, which would deter young attorneys from entering the market and entrench the more established members of the bar. Moreover, regardless of how characterized, the justification proffered by petitioner here is no more substantial than the support mustered for a number of other restrictions on speech which this Court has struck down in recent years. *See, e.g., First National Bank of Boston v. Bellotti, supra* (interest in preserving the integrity of the electoral process); *Virginia State Board of Pharmacy v.*



*Virginia Citizens Consumer Council, supra,* (interest in maintaining high professional standards among pharmacists); *Buckley v. Valeo, supra* (interest in preserving integrity of electoral process).

Petitioner's fall-back argument — that there is no interference with First Amendment rights because "the Union was free to advise the public of its dispute with Safeco by distributing handbills at the neutral title companies' premises. . . ." (Pet. Br. at 24) — is similarly flawed. First, serious questions exist as to whether the restriction in fact "leave[s] open ample alternative channels of communication." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer council, supra,* 425 U.S. at 771. Picketing is highly visible, inexpensive, and is readily understood by the public. Moreover, the options available to unions — handbills, soundtrucks, and newspaper advertisements — can involve far more cost than picket lines manned by union members, and in any event are plainly less effective.

Second, this Court has rejected precisely this argument — that there is no abridgment when there are alternative channels available to the speaker and listener — in a number of cases. *See, e.g., Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 U.S. at 93-95; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U.S. at 757 n. 15; *Spence v. Washington,* 418 U.S. 405, 411 n.4 (1974); *Healy v. James,* 408 U.S. 169, 183 (1972); *see also Procunier v. Martinez,* 416 U.S. 396, 408-409 (1974). Indeed, petitioner cites no case where this Court has upheld a ban on one form of communication simply because alternative modes were available. The Board's argument also ignores the fact that the consequences of being denied the right to picket under these circum-

stances are considerable by any measure. Petitioner's position, if sanctioned by this Court, will effectively insulate industries in which sales to the public are conducted not by the struck company itself, but through dealerships, franchises or other agents, from labor picketing designed to promote public support for the union. As noted above, that result will take a substantial toll on the rights of unions and consumers to disseminate and receive information, and will interfere with the exercise of associational rights of both groups.

There is a further significant flaw in petitioner's argument. While the line between picketing struck goods and picketing the retailer is a bright one which can be drawn with precision and with which the union can comply on its own, the line petitioner urges this Court to draw is hardly clear. Indeed, under petitioner's view of the law, it will seldom be clear, especially to one without access to the retailer's books and records, whether the retailer's predominant product is that of the struck employer. Thus, unions will be saddled with the burden of determining, prior to picketing, the precise product mix of the retailer and the likely effect of picketing on its business. And the opportunity to stray is great here; not only is there room for the union to misjudge the product mix of the retailer, but also the test urged by the petitioner — *i.e.* that "the picketing, if successful, will . . . persuade the retailer's customers to cease dealing with it altogether" (Pet. Br. at 2) — is extremely speculative and thus will be difficult to apply. Consequently, it is likely, if indeed not inevitable, that unions will be chilled from picketing in far more cases than necessary, in effect creating a form of prior restraint. As a result, the situations in which the public remains in the dark about the existence and the nature of the dispute



will increase significantly because unions will fear to exercise their right to picket guaranteed by the First Amendment due to uncertainty over its legality.

Moreover, a finding that the activities of respondent in this case are not constitutionally protected would carry serious implications for other forms of picketing to promote consumer boycotts. Labor unions are not the only groups which use picketing to further their organizational goals. Consumer groups such as *amici*, as well as other advocacy organizations, frequently engage in picketing, both to inform the public and promote support for their concerns. Indeed, consumer groups often seek public support for a boycott of a particular firm's products. If this Court rules that petitioner may proscribe this form of informational picketing, that ruling may well be read as an open-ended invitation to states and municipalities to attempt to cut back on the right to picket in a number of other contexts. For this reason as well, *amici* urge this Court not to retreat from its prior decisions holding that picketing is entitled to substantial First Amendment protection.

* * *

The ultimate conclusion flowing from this discussion is that petitioner is seeking to impose a construction on section 8(b) (4) (ii) (B), which, if sanctioned by this Court, can only lead to the supression of information about which the public is vitally concerned. Prior decisions of this Court make it clear that the sole justification for the prohibition, to protect the economic position of retailers, cannot support the picketing ban. As this Court long ago observed: "[i]f there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced

silence. Only an emergency can justify repression." *Whitney v. California,* 275 U.S. 357, 377 (1927) (Brandeis, J., concurring), *quoted in Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 U.S. at 97.

## CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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